No.

In the Supreme Court of the United States

MASTERCARD INTERNATIONAL INCORPORATED,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

NOAH J. HANFT
EILEEN S. SIMON
JAMES P. MASTERSON
MasterCard International Incorporated
2000 Purchase Street
Purchase, New York 10577
(914) 249-2000

KEVIN J. ARQUIT
AIMEE H. GOLDSTEIN
Simpson, Thacher & Bartlett LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
MAX HUFFMAN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

[additional counsel listed on inside cover]

KENNETH A. GALLO
Paul, Weiss, Rifkind,
Wharton & Garrison LLP
1615 L Street, NW
Suite 1300
Washington, D.C. 20036
(202) 223-7300

JAMES C. EGAN, JR.
Weil, Gotshal & Manges LLP
1501 K Street, N.W.
Suite 100
Washington, D.C. 20005
(202) 682-7000

QUESTION PRESENTED

Whether a loyalty restriction ancillary to a joint venture that prevents members of the joint venture from competing with it – by sharing their distribution capabilities with a highly successful interbrand competitor of roughly equal size that already has access to all consumers – violates Section 1 of the Sherman Act, when there is no dispute that competition has flourished to consumers' great benefit.

PARTIES TO THE PROCEEDING

The petitioner is MasterCard International Incorporated, one of the three defendants-appellants in the proceedings below. The respondent, plaintiff-appellee below, is the United States. The other defendants-appellants in the proceedings below were Visa U.S.A. Inc. and Visa International Corp.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, MasterCard International Incorporated states that it is a wholly owned subsidiary of MasterCard Incorporated and that no publicly held company owns more than 10% of the stock of MasterCard Incorporated.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 344 F.3d 229. The opinion of the district court (App., *infra*, 26a-176a) is reported at 163 F. Supp. 2d 322. The district court issued an opinion (App., *infra*, 177a-185a), reported at 183 F. Supp. 2d 613, and a final order (App., *infra*, 186a-189a), which is unreported. The district court's order granting a stay pending appeal (App., *infra*, 190a-193a) is not officially reported, but is reproduced at 2002-1 Trade Cas. ¶ 73,586.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2003. The order of the court of appeals denying rehearing *en banc* (App., *infra*, 24a-25a) was entered on January 9, 2004. On March 25, 2004, Justice Ginsburg granted an extension of time to petition for a writ of certiorari to and including May 8, 2004 (a Saturday). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, makes illegal "contract[s], combination[s], or conspirac[ies], in restraint of trade or commerce."

STATEMENT

This case concerns an antitrust judgment that a legitimate and procompetitive joint venture may not require its members, as a condition of participation in the joint venture, to limit the degree to which they will compete against the venture. Such requirements are adopted by joint ventures of all kinds and sizes in innumerable industries, because they are necessary to ensure that joint venture partners will have incentives to contribute to the venture's commercial success and to prevent opportunistic behavior that could undermine the venture. Although loyalty requirements, by definition, limit competition between a joint venture and its members, the antitrust laws usually have recognized that such requirements benefit consumers and enhance the competitive process by promoting more vigorous competition between the joint venture and other competitors in the market. For loyalty requirements to violate the antitrust laws, they must meaningfully *foreclose* competitors from access to consumers or essential inputs or methods of distribution, *and* the anticompetitive effects of the foreclosure must outweigh the procompetitive effects of making the joint venturers work toward the success of the joint venture.

The judgment below rests on the erroneous conclusion – in conflict with the holdings of other circuits – that consumer interests and the degree of foreclosure need not be considered if the joint venture is formed by horizontal competitors. Because of that error, the lower courts looked past findings of falling prices, expanding output, intense competition in the payment card industry, and the ability of MasterCard's rivals to reach *all* consumers effectively. The court struck down petitioner's membership policy largely because it accomplished a *legitimate* purpose: it enhanced MasterCard's interests at the expense of its competitors. Those competitors were prevented from distributing their products through MasterCard's member banks, but indisputably were not foreclosed from access to consumers. The Second Circuit erred when it ignored the latter fact simply because the challenged restraint was adopted by a horizontal joint venture. This misguided departure from other circuits' approach to procompetitive joint ventures threatens to reduce competition in a critical industry and to undermine procompetitive ancillary restraints used by joint ventures of all kinds.

It is unusual for a plaintiff to prevail in a rule-of-reason case, and all the more so in a case involving a garden-variety restraint ancillary to a joint venture that all concede is procompetitive. The result in this case is stranger still when one realizes that MasterCard's relevant market share was only 26%. The strangeness becomes ominous when one realizes that the beneficiary of the result below will *not* be consumers, but rather American Express (Amex), a successful competitor essentially the same size as MasterCard but with higher prices and an expressed desire to *keep* prices high. The fundamental restructuring of an industry central to the U.S. economy should rest on a sounder footing, and should be evaluated by this Court.

A. The Payment Card Industry

1. Petitioner is a joint venture owned and operated by some 20,000 banks, formed "to achieve benefits [that the banks] could not provide independently, including [a] globally recognized brand[] and sophisticated computer networks for processing transactions." App., *infra*, 36a.[1] Membership is open to any eligible bank. *Ibid*. A member bank may serve as an issuer, an acquirer, or both. Issuing members issue cards to consumers bearing the MasterCard trademark, in competition with other issuers, and acquiring members sign merchants to accept cards, in competition with other acquirers. *Id.* at 36a. MasterCard owns and operates the network through which payment card transactions are processed, promotes the MasterCard brand, and licenses the use of the MasterCard trademark. *Id.* at 35a. Visa U.S.A. Inc. is a joint venture organized in a similar fashion, also owned and operated by member banks (many of which are also MasterCard members). *Ibid.*

In a credit card transaction that takes place on the MasterCard network, the merchant receives approximately 2 percent less in payment for the good or service than in a cash transaction, in exchange for a host of benefits, including guaranteed payment. Of this 2 percent "merchant discount rate," the majority (the interchange fee) is earned by the card-issuing bank (which accepts the risk of nonpayment by the consumer), and the remainder is earned by the acquiring bank. App., *infra*, 36a. Acquiring banks set the merchant discount rate; the joint venture sets the interchange rate, as part of an adjustment among all participants in a four-party system. *Id.* at 34a-36a & n.4. This

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[1] Upholding a restraint ancillary to the very similar Visa joint venture, the Eleventh Circuit held that "none of [the] members could produce [the product] individually. The product, then, 'is truly greater than the sum of its parts.'" *Nat'l Bancard Corp.* v. *Visa U.S.A., Inc.*, 779 F.2d 592, 602 (11th Cir. 1986) (*NaBanco*) (quoting *Broadcast Music, Inc.* v. *Columbia Broad. Co.*, 441 U.S. 1, 21-22 (1979) (*BMI*)).

apportionment "is an internal accounting procedure between joint venturers that shifts a portion of the revenues from the merchant-signing partner to the card-issuing partner." *NaBanco*, 779 F.2d at 602-603 (internal quotation omitted).

The MasterCard and Visa joint ventures are responsible for the vibrant competition in the payment card industry. Before the formation of MasterCard and Visa, there were no national credit cards, and existing charge cards had minimal utility. App., *infra*, 38a. "It was not until the 1970's that the growth of the payment card industry was significantly facilitated by the formation and growth of what would become the Visa and MasterCard associations." *Ibid.* In large part because of those associations, "credit and debit cards * * * can be used nationally and internationally at millions of merchants [and] are issued by thousands of association members." *Ibid*. The percentage of households with credit and charge cards has quadrupled as minimum qualifications for credit cards have declined dramatically in recent years and, "[e]ven without adjusting for the increased quality of services provided, prices to consumers have decreased 20 percent from 1984 and 1999." *Ibid.* MasterCard and Visa have competed intensely to develop innovative offerings and to develop and deploy technology that has reduced transaction authorization times and greatly reduced fraud rates. *Ibid.*

Through its bylaws, MasterCard encourages vigorous competition among card issuers. "The members of * * * MasterCard compete with each other on practically every other dimension that directly impacts consumers, including pricing, fees, and finance charges, product features and other services for cardholders and merchants." App., *infra*, 36a. This competition is intense, and "largely determines the prices that consumers pay and the variety of card features they can obtain" *Id.* at 37a. "Consumers have access to products that combine dozens of features available through associations with the features and services developed by the individual issuers." *Id.* at 38a. Consumers have "thousands" of credit card choices and "already [have] plenty of cards and product features." *Id.* at 125a. They also can easily switch among systems and among issuers. Approximately $47 billion in credit card balances was transferred via balance transfers in 1999. *Id.* at 39a. Many issuers offer cards with low or no annual fees, and consumers can accept new cards without cost and without canceling their existing cards. *Ibid.*

2. Both MasterCard and Visa have adopted a policy of "duality," under which banks may be members of both associations – giving them the ability to issue cards of both associations and acquire merchants to accept cards of both associations.

MasterCard has always favored duality, but in 1971 Visa sought to impose restrictions that would prevent its members from participating in the MasterCard joint venture. A Visa member filed an antitrust suit challenging that policy, and Visa sought assurances from the Antitrust Division of the Department of Justice that it would not challenge the policy. The Division refused to provide such assurances. App., *infra*, 59a. Visa then abandoned exclusivity, and virtually all banks became members of both joint ventures. See DAVID EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC 70-71 (2d ed. 2000).

Visa tried again in 1977, expressing concern that dual issuance caused a "movement toward common operations and marketing and increasing concerns about confidentiality issues." App., *infra*, 60a. "In response, the Government 'expressed no adverse opinion' about 'the rush toward dual issuance.' It instead indicated that 'it perceived bank-to-bank competition of utmost importance' and 'any risks to be taken should be to system-to-system competition.'" *Ibid.*

Even with duality, both MasterCard and Visa have competed fiercely to maintain brand-level separation and promote brand loyalty. Over the past several years, both associations have attempted to secure the loyalty of members through "longer term agreements that would exchange monetary and other incentives for greater brand loyalty and dedication." App., *infra*, 99a. Through those agreements, "the associations have tried to secure brand loyalty commitments from their members, including the limited number of very large issuers who account for large percentages of card volume." *Id.* at 102a. At the time of trial, MasterCard had entered into a number of partnership or member business agreements with some of the largest issuing banks, each of which agreed to issue the vast majority of its cards under the MasterCard brand in return for incentives or reductions in fees. *Id.* at 100a-105a. "These specialized members have an incentive to push one system over another" (EVANS & SCHMALENSEE, *supra*, at 70) – so competition between petitioner and Visa is vigorous. See App., *infra*, 91a-100a.

3. General purpose cards also are offered by Amex and by Discover. In contrast to petitioner's joint venture, Amex and Discover operate as vertically integrated "closed loop" systems. Each issues its own cards, acquires merchants, and operates its own network to process transactions. App., *infra*, 36a. Both Amex and Discover are successful competitors. Discover was launched by its original parent company, Sears Roebuck & Co., in 1985. "Less than two years after its release, there were already 22 million [Discover] cards in circulation." EVANS & SCHMALENSEE, *supra*, at 75. At the time of trial, Discover was the fifth largest card issuer, measured by transaction volume, and the third largest card issuer, measured by number of cards outstanding. App., *infra*, 37a-38a. In 1999, Discover processed approximately 6% of the total dollar value of card transactions in the United States. *Id.* at 51a. Discover has continued to grow its business successfully. C.A. ER E-1171, E-1175, E-1702, T-2590 to -2591.

Amex, as of 1999, was the *largest* issuer of credit and charge cards in the United States, measured by transaction volume. App., *infra*, 37a. Amex has been "highly profitable and it regularly meets its return on equity and earnings per share growth targets." *Ibid.* Measured by dollar value, Amex processed approximately 20% of card transactions in 1999 – slightly less than the 26% share generated on the MasterCard network by all of its 20,000 members *collectively*. Its receivables increased 27.2% in 1999 alone. C.A. ER E-1171, E-1175.

Testimony at trial indicated that Amex pursued a business strategy under which it sought to attract "high-spend" cardholders, and to have its cards accepted at those locations frequented by high spenders. This strategy permitted it to demand premium merchant fees from upscale merchants on the premise that merchant acceptance of the Amex card would attract the business of upscale cardholders. In 1999, Amex's average merchant discount rate was approximately 2.73 percent,[2] compared to the rate of approximately 2% merchants pay their banks to acquire MasterCard transactions, and Discover's rate of approximately 1.5%. App., *infra*, 36a-37a.

In the early to mid-1990s, premium MasterCard and Visa bankcards – offering many of the same premium features of Amex – became more prevalent. As high-spend consumers (whom Amex had always targeted) increased use of MasterCard's and Visa's products, merchants began to question the value of the higher Amex merchant fees.

Amex responded by seeking to establish issuer relationships with a limited number of member banks – those banks with high-spend/corporate-card portfolios. It was not shy about disclosing its motives and ultimate goals. Its Chairman and CEO, in a speech to card-issuing banks, stated that the associations had set their interchange fees too low and at a level that forced Amex to lower its merchant fees. He added: "Thus, as a Visa member, I would wonder how it is in my interest to have merchants push American Express to lower merchant rates as they did for years in the late 1980s and early 1990s?" C.A. ER E-1709. He also told bank issuers that the associations had spent too much money on advertising, promotion, and new product development, and specifically too much "to fund the development and sales of corporate and purchasing card systems." *Ibid.* He suggested that bank issuers selectively use the Amex network by shifting their more profitable "convenience customers" to Amex to "realize the advantages of more economic [*i.e.*, higher] merchant discount rates." *Ibid.* The speech did not augur benefits for consumers.

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[2] This is the rate Amex imposed in 1997 (after the adoption in 1996 of the loyalty rule at issues in this case), down from the 3.22% discount rate Amex charged in 1990. EVANS & SCHMALENSEE, *supra*, at 76.

4. In response, MasterCard adopted the competitive programs policy (CPP), which – like a similar bylaw Visa had adopted in 1991 – prevented its members from partnering with Amex and Discover to compete against MasterCard. App., *infra*, 9a n.3. Also like Visa, which had been told by the Antitrust Division in 1971 and 1977 that duality was required, and that issuer-level competition was of primary importance (see p. 5, *supra*), MasterCard chose to highlight intra-system issuer competition over inter-system competition, and the CPP included duality. As adopted, the CPP states (App., *infra*, 9a n.3):

> With the exception of participation by members in Visa, which is essentially owned by the same member entities, and several pre-existing programs to the extent individual members participate, * * * members of MasterCard may not participate either as issuers or acquirers in competitive general purpose card programs.

B. The Proceedings Below

The Government sued MasterCard and Visa, alleging that each defendant had employed two practices that violated Section 1 of the Sherman Act, 15 U.S.C. § 1. App., *infra*, 27a. First, the Government alleged that the associations, by permitting "dual governance" – allowing substantial Visa issuers to sit on the governing board of MasterCard, and vice versa – created mixed or diminished incentives for competition between the associations. *Id.* at 27a-28a. Second, the Government claimed that each joint venture had violated the antitrust laws by adopting rules – MasterCard's CPP and Visa's similar policy – that prevented their respective members from issuing Amex and Discover cards. *Ibid.*

1. The district court rejected the Government's first claim. It found "vigorous competition between MasterCard and Visa" (App., *infra*, 89a) – including a long list of product innovations and "a history of share-shifting competition." *Id.* at 94a-100a. The Government failed to prove that dual governance caused "any significant blunting of brand promotion or network and product innovations." *Id.* at 29a. Significantly, the district court rejected the Government's attempt to point to the CPP as

evidence of an anticompetitive effect of dual governance. Instead, the court quoted approvingly from the evidence that "the MasterCard U.S. Region Board, after considering 'cherry-picking' and other concerns related to brand dedication, adopted the CPP." App., *infra*, 109a. The district court further criticized the Government for never having "asked the board banks who voted for the CPP whether they did so out of concern for MasterCard's brand or for some other reason." *Id*. at 110a.

The second half of the district court's opinion reads as if it followed an entirely different trial. Having accurately described the intense competition in the relevant markets, the court held that the CPP violated the Sherman Act. App., *infra*, 118a-119a.

Initially, the district court held that petitioner and Visa had market power. The court relied in part on a presumption of market power from petitioner's, and Visa's, "large market shares in a highly concentrated network market" (App., *infra*, 51a), but cited no authority for the proposition that petitioner's 26% market share raised a presumption of market power.[3]

Harm, the district court held, took place at two levels. At the network level (where the court found product innovations and share-shifting competition (see p. 8, *supra*)), Amex and Discover were denied competitive advantages developed by petitioner and Visa, thereby "restricting the competitive strength of American Express and Discover." App., *infra*, 30a. To hold that Amex and Discover were harmed, the district court decided (despite the clear success of these competitors) that card distribution through MasterCard's and Visa's members was "essential" to a competitor in the market: "The Visa and MasterCard member banks are the sources of virtually all of the expertise in issuing general purpose cards in the United States

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[3] The court also made reference to petitioner's and Visa's shared "control over 73 percent of the volume of transactions on general purpose cards in the United States." App., *infra*, 52a. Of course, holding that the Government had failed to prove its first claim, the district court already had held that petitioner and Visa did not act in concert with one another. See pp. 8-9, *supra*. Their combined share in what the court considered to be the relevant market therefore is legally irrelevant.

outside of American Express and Discover themselves." *Id.* at 136a. The district court held that consumers also were harmed – not by overall reduced output or increased price (which nobody asserts has occurred in this case) – but by the unavailability of Amex and Discover cards *issued by banks,* which the district court called "reduced product output." *Id.* at 31a.

MasterCard advanced the justification for its ancillary loyalty provision that is reflected throughout its documents generated contemporaneously with the decision to adopt the CPP (see App., *infra*, 109a-110a) – a justification courts and commentators have accepted *de rigueur* since the D.C. Circuit's holding in *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986). The justification is that, because the CPP was required (1) to prevent Amex and Discover from cherry-picking MasterCard's strongest members, and (2) to prevent members that did partner with Amex or Discover from free-riding on the efforts of those that did not, this restraint ancillary to a concededly procompetitive joint venture was valid under the rule of reason. App., *infra*, 155a. The district court rejected that justification, because petitioner was motivated (like every other joint venture adopting such a restriction) by a desire to limit competition from its rivals. *Id.* at 155a-157a. Also, the court held that the decision to preserve duality belied the assertion that the CPP was necessary to maintain cohesion and prevent free-riding. *Id.* at 159a-162a. The court enjoined MasterCard and Visa from enforcing their loyalty provisions and certain related agreements. App., *infra*, 186a-189a.

Petitioner and Visa moved for a stay of the judgment pending appeal. The district court noted "that this is a case involving substantial legal issues and a complex industry." App., *infra*, 191a. The court also was persuaded that its "critical factual findings did not require credibility determinations," and that "[d]efendants have demonstrated they may suffer irreparable harm should this court decline to issue a stay." *Ibid.*

2. The Government did not appeal the district court's judgment that dual governance does not violate the Sherman Act.

MasterCard and Visa appealed the district court's judgment that their respective loyalty requirements were illegal.

In a brief opinion, the Second Circuit affirmed. The court acknowledged that the rule of reason applies to the ancillary restraint in this case. App., *infra*, 13a. It held that petitioner and Visa had market power – affirming the district court's holding, but adding that the joint ventures "effectively preclud[ed] their largest competitor [Amex] from successfully soliciting any bank as a customer for its network services and brand." *Id.* at 16a.

The Second Circuit then affirmed the district court's holding that competitive harm resulted from the CPP and Visa's analog, despite also being impressed by the "robust" competition "at the issuing level (where 20,000 separate issuers compete to provide products to consumers)" (App., *infra*, 17a) – the same competition that the Antitrust Division considered in 1977 to be paramount (see p. 5, *supra*). Vibrant innovation and output increases in the market were not enough; the Second Circuit saw harm in the lack of a specific *type* of output, of Amex or Discover cards issued by banks. App., *infra*, 18a.

Petitioner argued that the CPP properly could be analyzed as an exclusive dealership arrangement, which to be illegal "must prevent competitors from getting their products to consumers at all." App., *infra*, 20a. The Second Circuit did not hold that Amex and Discover were foreclosed from access to consumers under this standard. Instead, the Second Circuit held that, as horizontal joint ventures, petitioner and Visa were held to a different standard sounding very much like the *per se* rule that the court had admitted did *not* apply: "Each [member bank] has agreed not to compete with the others in a manner which the consortium considers harmful to its combined interests. Far from being 'presumptively legal,' such arrangements are exemplars of the type of anticompetitive behavior prohibited by the Sherman Act." *Id.* at 22a.

Finally, the Second Circuit affirmed as "reasonable" the district court's holding that the CPP is "not necessary to accomplish" the goal of maintaining cohesion within the joint venture. App., *infra*, 23a.

REASONS FOR GRANTING THE PETITION

Joint ventures are ubiquitous throughout the economy. They come in all shapes and sizes and operate in virtually every industry. Competing attorneys combine their practices to form law firms. See ROBERT H. BORK, THE ANTITRUST PARADOX 332-333 (1978). Small businesses establish purchasing cooperatives to procure supplies. See *Northwest Wholesale Stationers, Inc.* v. *Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985). Tens of thousands of copyright owners offer a blanket license for use of their intellectual property. See *BMI*, 441 U.S. 1.

On rare occasions, competitor collaboration to form such ventures can harm consumers and violate the antitrust laws. But horizontal joint ventures are *not* inherently suspect under the antitrust laws. Rather, they are so common and so diverse because they are a particularly useful means of achieving legitimate and pro-consumer business objectives that the antitrust laws favor. See Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 WM. & MARY L. REV. 871, 876 (1994) ("A joint venture may allow its partners to achieve economic efficiencies that they could not have accomplished on their own. In the long run, such efficiencies may outweigh any restriction of competition caused by a joint venture.").

Notwithstanding their enormous diversity, one issue must be addressed in each of a great variety of joint ventures: Partners must be encouraged to work toward the success of the venture and discouraged from behavior that could undermine the venture's success. Agreements that limit the ability of partners to compete against the joint venture serve this purpose. For example, if three lawyers form a law partnership, they might (to ensure that each of them worked towards the success of the firm) agree that no partner could practice law outside the partnership, with a competing firm or otherwise. Agreements of this kind unmistakably restrain competition – that is their very point. They also prevent the joint venture's partners from pursuing profitable business opportunities – there would be no need for the law firm to impose its restriction if partners would never be tempted to engage in the prohibited behavior. And these agreements will often have their intended effect – partners will decline opportunities to compete against the partnership, preferring to practice exclusively in a successful partnership.

In the absence of extraordinary market circumstances, however, the lawyers' agreement would not harm competition or consumers. See *Nat'l Football League* v. *N. Am. Soccer League*, 459 U.S. 1074, 1078 (1982) (Rehnquist, J., dissenting from denial of certiorari) (*NFL*); *Rothery*, 792 F.2d at 224 n.10. Even though the "loyalty" requirement is a horizontal restraint, adopted for the purpose of restricting competition and having that effect, it may well be a *reasonable* restraint, and hence permissible under the antitrust laws. See *Bd. of Trade of Chicago* v. *United States*, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."). As Judge William Howard Taft explained (*United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898)):

> [W]hen two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged.

This doctrine of "ancillary restraints" – well accepted in the courts of appeals until the decision below – recognizes that limits on competition between a joint venture's partners, or between partners and the joint venture itself, can help the joint venture to compete more effectively against other firms. For that reason, ancillary restraints can benefit rather than harm consumers[4] and must be evaluated under the rule of reason, with attention to *real* competitive effects such as meaningful foreclosure, not disapproving labels. Here, MasterCard's CPP reflects a simple, commonsense analysis. If MasterCard member banks cannot issue Amex or Discover cards, those banks will have powerful incentives to enhance the quality and minimize the price of services provided through the MasterCard network. By doing so, they will attract the patronage of cardholders and merchants who might otherwise choose the services offered by Amex or Discover. But if MasterCard's member banks are permitted to issue Amex and Discover cards, their competitive incentives will be softened. They will have less reason to enhance the MasterCard network or to promote the brand.

This problem is compounded if – as Amex Chairman Golub's speech indicated Amex intended – the opportunity to issue Amex and Discover cards is extended only to some, not all, MasterCard member banks. Banks that cannot issue Amex and Discover cards will still have undiluted incentives to invest in the success of the MasterCard network. Recognizing this, the other, "disloyal" banks will be tempted to look for a free ride. They will seek ways to minimize their own investments to make MasterCard more attractive to cardholders and merchants, expecting that loyal member banks will take up some of the slack. By selectively targeting certain MasterCard members to funnel high-end transactions away from the MasterCard network, Amex could both benefit itself and create harmful dissension within the MasterCard joint venture, making MasterCard a less effective competitor and ultimately *harming* consumers.

A joint venture's loyalty requirements, of course, are not immune from antitrust scrutiny. Such requirements may violate the antitrust laws if the defendants have market power within a properly defined market; if the loyalty requirement has demon-

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[4] This case presents a prime example. Until recently, Amex's merchant discount rate was 3.22%. It was reduced to 2.73% as a result of competition by the joint ventures. See note 2, *supra*.

strable anticompetitive effects; and if the defendants fail to show a countervailing procompetitive justification. The purpose of these inquiries is to determine whether the loyalty requirement will ultimately harm consumers – in this case, cardholders and merchants. A loyalty requirement could harm the competitive process – and thus consumers – by foreclosing all or a very large percentage of the ways for rivals to compete for consumers' business, but merely forcing those rivals to use their own competitive strengths and assets – not those of the joint venture – to reach consumers *furthers* the competitive process.[5]

Here, the district court's factual findings make clear that consumers were not harmed. Those findings show that Amex and Discover were successful competitors that were not foreclosed from competing for the business of any consumers, and that intense competition among the four major card networks

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[5] Foreclosure is the essence of the claim here. It is not enough, of course, to establish the tautological proposition that Amex and Discover were "foreclosed" from MasterCard's member banks. Our economy abounds with instances in which a firm cannot access a rival's distribution system but that inability has no negative effect on competition as a whole. Instead, "foreclosure," in Sherman Act terms, means the inability to access the *ultimate consumer*. If Coca-Cola had an exclusive relationship with an independent trucker in Los Angeles, it would be correct – but competitively meaningless – to state that the inability of other soft-drink companies to use that trucker deprives consumers of the "combined skills" (App., *infra*, 147a) of those other companies and the trucker. Foreclosure of competitive significance would exist *only* if other soft-drink companies had no other way to get their products to consumers – if they had no access to a different independent trucker *and* did not have or could not obtain trucks of their own. The court of appeals acknowledged this point (*id*. at 20a) but insisted that, "if Coca-Cola, Pepsi-Cola and several other leading sellers of soft drinks joined together to form an association to contract for trucking services and extracted of contracting truckers a commitment not to carry for any soft drink maker that was not part of the consortium," this would be an "exemplar[] of the type of anticompetitive behavior prohibited by the Sherman Act." App., *infra*, 21a. That is not so, and the step missing from the court's analysis of the analogy is precisely the step missing from its analysis of the case actually before it: Did the horizontal agreement harm *competition* by foreclosing rivals from something they actually *needed* to compete? Here, of course, Amex and Discover are fully integrated into all aspects of card issuing and processing, and the answer to that question undeniably is no.

and among the thousands of issuers and acquirers resulted in falling prices, expanding output, and technological innovation. The courts below disregarded this evidence of consumer effects. In a radical departure from the received learning in other circuits, they rested determinations of market power, anticompetitive effects, and the absence of a procompetitive justification on little more than findings that the restraint prevented MasterCard's member banks from competing against their joint venture – which *of course* it did – with the result that some of MasterCard's competitors were prevented from engaging in specific types or forms of competition. These are the kinds of evidence that *every* ancillary restraint will generate, and for that reason the decisions below threaten a wide variety of competition-enhancing joint venture arrangements.

I. The Second Circuit's Decision Conflicts With Decisions From The D.C. Circuit And Tenth Circuit, And Is In Tension With This Court's Decision In *Trinko*

The Second Circuit's decision conflicts with decisions by the Tenth Circuit in *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 971-972 (10th Cir. 1994) (*MountainWest*), and the D.C. Circuit in *Rothery*. In all three cases, the challenged agreement was analyzed as a horizontal restraint. Compare App., *infra*, 21a, with *MountainWest*, 36 F.3d at 964; *Rothery*, 792 F.2d at 214-215. In all three cases, the restraint was intended to, and did, prevent competition between a joint venture's members and the joint venture itself, and by doing so protected the joint venture against a loss of business to a competitor. Those features were deemed insufficient to support an antitrust case in *Rothery* and *MountainWest*, but were deemed conclusive of liability below. This Court should resolve the conflict.

A. *MountainWest*, a case that is the mirror image of this one, involved an antitrust challenge to a Visa bylaw that denied membership in the Visa joint venture to entities, including Amex and Discover, that competed against Visa. 36 F.3d at 970. Sears (the owner of Discover at that time) hoped to issue a premium-branded Discover product on the Visa system, while continuing to issue its own proprietary card product in competition with Visa cards. *Id.* at 961. When Visa adopted a bylaw to prevent such competition, Sears and its corporate subsidiary sued. *Id.* at 960-961. The Tenth Circuit upheld the bylaw, deeming it "ancillary, 'subordinate and collateral[,] making the main transaction more effective in accomplishing its purpose.'" *Id.* at 970 (quoting *Rothery*, 792 F.2d at 224). The court noted that "'selectivity in the membership of a joint venture often enhances a joint venture's procompetitive potential. Forcing joint venture members to open membership to all competitors * * * would decrease the incentives to form joint ventures.'" *Id.* at 972 n.20 (quoting Department of Justice, *International Operations Antitrust Enforcement Policy* 42 (Nov. 10, 1988)). In stark contrast to the decision below, the Tenth Circuit rejected the plaintiff's argument that it could "compete more effectively" but for Visa's restraint by combining innovative card features and an attractive brand, and deemed irrelevant the origin of Visa's policy to protect against Sears's threat to the profits of Visa members. *MountainWest*, 36 F.3d at 967.

Mountain West properly applied the principles articulated in *Rothery*, a seminal decision recognizing that restraints on intra-venture competition can benefit consumers by enhancing competition between a joint venture and its rivals. Atlas was a household moving company that operated by contracting with independent moving companies as agents to transport goods for consumers. The agent companies signed agreements with Atlas that governed "standard operating procedures, maintenance and painting specifications, and uniform rates." 792 F.2d at 211. The Atlas board members, agents of the company, adopted a policy under which Atlas would "terminate the agency contract of any affiliated company that" did business "on its own account as well as for Atlas." *Id.* at 213. Several agent companies sued, claiming a group boycott in violation of Section 1.

In an opinion by Judge Bork, the D.C. Circuit affirmed summary judgment for Atlas. The court held that the loyalty requirement – analyzed as a horizontal agreement among the agents – was an ancillary restraint "designed to make the van line more efficient rather than to decrease the output of its services and raise rates." 792 F.2d at 211. "If Taft's formulation [of ancillary restraints] is the law today, it is obvious that the Atlas agreements are legal, for *Addyston Pipe & Steel*'s analysis of ancillary restraints fits this case exactly." *Id.* at 224.

The Government has tried to draw distinctions between the cases, but those distinctions are immaterial. The Government asserts that the issue in *MountainWest* was whether a Discover affiliate could issue Visa cards, while this case concerns Visa members' abilities to issue rival cards. According to the Government, the former question requires consideration of intrasystem competition while the latter concerns intersystem competition among the four networks. U.S. C.A. Br. 100-101.

Whether the restraint is applied to prevent a member from becoming a competitor (as in this case) or to prevent a competitor from becoming a member (as in *MountainWest*) does not matter; in either case, separation between the venture and its competitors will enhance the incentives of each to invest in competition against the other. Moreover, there is no meaningful difference in the degree of competition prevented in *MountainWest* and in this case, even if such a difference of degree would be legally significant.[6] The district court described *MountainWest* as recognizing that "[t]he value of an additional one of thousands of Visa-branded issuers to intrasystem competition did not outweigh the effects of having weakened network or brand level competition." App., *infra*, 48a n.10. Without a trace of irony, it then suggested that the CPP harmed competition because, "[e]ven though there are thousands of issuers already in the United States, more are always better." *Id.* at 133a.

It is impossible, as well, to reconcile the cases by pointing to differing findings of "fact" concerning the parties' procompetitive justifications for the restraints. The district court's

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[6] See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 14 (1984) ("How much 'reduction in intrabrand competition' is a court to tolerate in order to get how much 'increase in interbrand competition'? Such matters ordinarily are settled in the market. As a question for litigation it has no answer – which suggests that it is the wrong question to ask.").

finding in this case rested on its view that MasterCard's "real 'justification' was to stop competition" from Amex and Discover. App., *infra*, 155a. The Tenth Circuit, in *MountainWest*, properly rejected that argument as irrelevant, observing that even in a horizontal joint venture context "intent to harm a rival, protect and maximize profits, or 'do all the business if they can,' is neither actionable nor sanctioned by the antitrust laws." 36 F.3d at 969 (quoting *Ball Mem'l Hosp., Inc.* v. *Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1325 (7th Cir. 1986)).

More broadly, both *Rothery* and *MountainWest* properly recognize that encouraging investment in a procompetitive joint venture is ample justification for an ancillary loyalty requirement, and ask only whether a restraint is adopted to further this legitimate purpose, not whether it was essential to the venture's survival. *MountainWest*, 36 F.3d at 969; *Rothery*, 792 F.2d at 221. See also *NFL*, 459 U.S. at 1079 (Rehnquist, J., dissenting from denial of certiorari) ("The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity."). The result in this case differs from the result in *Rothery* and *Mountain West* because the district court and the Second Circuit applied an incorrect legal standard, not because of different facts. See Philip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 852 (1989) ("What constitutes legitimacy [of a restraint] is a question of *law* for the courts.") (emphasis added). If anything, it is *clearer* in this case than in *Rothery* and *MountainWest* that to maintain their own competitive strength MasterCard and Visa had to protect against opportunistic behavior by Amex and Discover in the form of cherry-picking the banks that could contribute the most to the joint ventures.

B. *Rothery* and *MountainWest* recognize, and rest on, the investment disincentives that forced sharing of competitive advantages creates. This Court recently endorsed the same rationale in the single-firm context in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004). Like the "horizontal" nature of the restraint here, the existence of market power in *Trinko* was said to limit the defendant's ability lawfully to keep its competitive advantages to itself. But, as this Court made clear, much more than market power will be required before the antitrust laws require a firm to give a helping hand to its competitors.

Whether that helping hand takes the form of sharing facilities of a single company, as in *Trinko*, or disaggregating a joint venture into its constituent companies so that some may cooperate with the competitor while still participating in the joint venture, as in this case, forced sharing weakens the incentives of the putative sharer to make *itself* the fiercest competitor it can be. In all but the most unusual circumstances, it is a perversion of the antitrust laws, and should not be imposed as lightly as it was by the Second Circuit in both the decision this Court reversed in *Trinko*, and the decision below.[7]

An antitrust compulsion for competitors – even monopolists – "to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest." *Trinko*, 124 S. Ct. at 879. MasterCard's CPP – its refusal to share with its competitors a part of its network that they want – clearly would be permissible if MasterCard was a single-firm competitor, rather than a joint venture. See *Trinko*, 124 S. Ct. at 881. Commentary supports treating the MasterCard joint venture identically to single-firm conduct. "[S]ome practices are at once cooperative and exclusionary, a good example being a boycott, or concerted refusal to deal * * *. But [these practices] can be analyzed within the same general framework used for analyzing unilateral exclusionary practices." RICHARD A. POSNER, ANTITRUST LAW 193 (2d ed. 2001).

The procompetitive purposes served by a joint venture's ancillary loyalty restraints are precisely the same procompetitive

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[7] Because the Second Circuit in the decision below repeated the mistake it made in *Trinko* of failing to recognize the incentive-dampening and therefore competition-weakening effects of forced sharing, it cannot possibly have struck the right balance under the rule of reason. The Court therefore may wish to grant the petition, vacate the judgment below, and remand for further proceedings in light of *Trinko*.

purposes that animated this Court's holding in *Trinko*. *Trinko* is based on the recognition that the imposition of a duty to deal with competitors is generally at odds with the pro-consumer goals of the antitrust laws. Even if such a duty would enhance consumer choice in the short run, "it may lessen the incentive for the monopolist, the rival, or both to invest in * * * economically beneficial facilities." *Trinko*, 124 S. Ct. at 879; see also Areeda, *supra*, at 851. The same dampening of competitive incentives arises when a joint venture participant is allowed to compete against the venture. Why should a MasterCard member support investment in the MasterCard network to attract high-spend customers to MasterCard's network if it can serve those customers by issuing Amex cards – particularly if that member's Amex card business would face less intense competition from MasterCard in the absence of those investments?

In *Trinko*, the Court left open the possibility that a single-firm monopolist might be required to provide access to its facilities if those facilities are "essential" to competitors. 124 S. Ct. at 880-881. But nothing in *Trinko* detracts from Justice Breyer's warning against "expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 430 (1999) (Breyer, J., concurring); see also Areeda, *supra*, at 852 ("There is no general duty to share. Compulsory access, if it exists at all, is and should be very exceptional."). That is because "[i]t is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge." *Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring) (emphasis in original).

The same logic applies when the "essential" asset or service is controlled by a joint venture, rather than a single firm. POSNER, *supra*, at 193. By that logic, access to MasterCard's member banks can hardly be deemed "essential" to Amex, which chose a very different vertically integrated structure. Even without access to the issuing capabilities of MasterCard's members, Amex has been highly profitable, became the country's largest card issuer, and operated a card network that processed almost as many transactions as MasterCard's network.[8]

Clarification that the antitrust laws do not impose sharing obligations on joint ventures merely because they achieve some degree of success, and when single-firm competitors would not be subjected to such obligations, is a matter of considerable economic importance. Many joint ventures operate in concentrated markets – indeed, they are often created to achieve scale economies that their members cannot achieve individually. The purposes of the antitrust laws will not be served if such joint ventures cannot compete aggressively, through loyalty provisions and otherwise, to expand their output – necessarily at the expense of competitors' sales – for fear of engendering an obligation to share their competitive advantages with others.

In this case, by redefining the *inherent* characteristics of loyalty restraints as proof of anticompetitive harm, without requiring any showing of harm to consumers, the courts below have placed themselves in conflict with the D.C. and Tenth Circuits and have created the very perverse incentives this Court warned against when it reversed the Second Circuit in *Trinko*. To resolve the circuit conflict, and once again to correct a misguided conception of when forced sharing is appropriate under the antitrust laws, this Court should grant review.

II. The Second Circuit's Decision Rests On Findings Of Intra-Venture Effects And Harm To MasterCard's Competitors, Rather Than Harm To Consumers

The decisions below rest largely on the facts that the CPP (1) resulted from a horizontal agreement, (2) prevented the joint venture's members from competing against the joint venture (and thus necessarily prevented competitors of the joint venture

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[8] And if Amex decides, as it did in 1996, to pursue a new business strategy that includes partnering with banks, Amex has every opportunity to compete with MasterCard for issuers' loyalty. As the Amex Chairman and CEO noted in 1996 regarding the "exclusionary" effect of Visa's loyalty provision, expulsion from the joint venture "is the gate that you have to walk through. * * * You own the key. You pay the gate keeper." C.A. ER E-1709.

from entering into business relationships with those potentially disloyal members), and (3) was adopted for the purpose, and had the effect, of preventing the joint venture from losing business to its competitors. Basing antitrust liability on such thin – and virtually tautological – analysis of loyalty provisions applies to such restraints an analysis indistinguishable from *per se* condemnation, and thereby threatens competition-enhancing ancillary restraints that may be adopted by virtually any joint venture. A proper *rule-of-reason* analysis, by contrast, would have focused on whether the very successful Amex and Discover cards are foreclosed from competing for the business of any consumers – which they are not.

A. Market power is the ability to raise prices above competitive levels or to exclude competitors from the market. See *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 27 n.46 (1984). The district court's findings do not demonstrate either.

The finding that MasterCard has market power rests largely on evidence that MasterCard's rule "foreclose[s] American Express and Discover from access to bank partners" in the sense that, but for the rule, "several large MasterCard members would have partnered with American Express." U.S. C.A. Br. 52. In other words, these banks would like to be MasterCard members *and* to issue Amex cards. Denied the opportunity to do both, they chose the former rather than the latter. The Government described this as "direct evidence" of MasterCard's market power, and it is this evidence on which the Government principally relied. *Ibid.*[9] The finding that Amex was foreclosed

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[9] The district court and the court of appeals also relied on the presumption of market power that may flow from high market share, even though MasterCard's market share at the time of trial was only 26%. App., *infra*, 51a; see also *id.* at 16a. We are unaware of any case in which market power has been presumed on the basis of such a small market share. See, *e.g.*, *Jefferson Parish*, 466 U.S. at 26 n.43 (30% market share insufficient); *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir.1945) (Hand, J.) (33% of relevant market is "certainly" not a monopoly). Tellingly, the Government itself conceded that the cases just cited "stand * * * for the proposition that one cannot infer market power *based on* an entity's market share of less than 30%," but argued that there is no case that "precludes" a

from issuing cards through MasterCard member banks, however, is not a finding that Amex was excluded from the *market*. The former is the type of "foreclosure" that will be produced by *every* restraint that prohibits joint venture members from partnering with competitors to the joint venture. The latter – exclusion from the market – is required to show market power, and hence a risk to consumers. As we discuss below, the district court's findings make clear that Amex and Discover had ample ability – and indeed were successful in their efforts – to serve cardholders and merchants, notwithstanding the CPP.[10]

B. The district court identified two categories of "anticompetitive effects" arising from MasterCard's CPP. Each type of effects will be produced by virtually every ancillary restraint that is adopted to promote loyalty to a joint venture. In both categories, the district court's findings show only harm to individual *competitors* (Amex, Discover, and potentially disloyal MasterCard member banks), not harm to *consumers* (cardholders and merchants). There are no cardholders, and no merchants, for whose business Amex and Discover are foreclosed from competing – all they cannot do is cherry-pick among the banks who have formed their competitor joint ventures.

The first category of "anticompetitive effects" arose from the district court's view that banks provide "essential attributes" to network competitors that Amex and Discover could not exploit because of the CPP. These attributes include expertise in marketing credit cards, the ability to cross-sell products to existing customers, and the ability to link card services to

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finding of market power when there is "direct evidence" of such power. U.S. C.A. Br. 59 (emphasis in original).

[10] Other "direct evidence" of market power is equally deficient. The court of appeals observed that "despite recent increases in [Visa's and MasterCard's] interchange fees, no merchant has discontinued acceptance of their cards." App., *infra*, 16a. This finding proves nothing about market power. Prices rise and fall in fully competitive markets, so a price increase, standing alone, does not suggest market power. The ability to retain merchant acceptance after raising fees (to a level still lower than Amex's) may simply reflect that even the increased fees offer merchants great value.

checking accounts. The district court's adjective ("essential"), however, is belied by the fact that a large majority of the MasterCard-branded credit cards are issued by banks that do not provide checking account services to the cardholder, or have any other relationship with the cardholder beyond the issuance of the MasterCard card.

Even though Amex had no access to the so-called "essential" capabilities of petitioner's member banks, Amex was able to capture 20% of the relevant market the court defined, a share only slightly smaller than petitioner's 26% share – and a share that has not declined since the promulgation of the CPP in 1996. Amex also achieved a high level of merchant acceptance even without the "essential" bank issuers: 96% of the "cardholder spend." App., *infra*, 134a & n.24. Its market share undoubtedly could have been higher, but for Amex's own business decision to charge substantially higher prices for its services than petitioner and Visa. See p. 7, *supra*. The district court also found that Amex is "highly profitable and it regularly meets its return on equity and earning per share growth targets." *Id.* at 37a.[11] Discover too has enjoyed great success.[12] Amex's and Discover's ability to compete was not impaired in any meaningful sense, and they were not foreclosed from reaching any potential consumers; they complained only that they "receive[] a handsome profit but [are] denied an even handsomer one." *Iowa Utils. Bd.*, 525 U.S. at 390 n.11.

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[11] By Amex's own measures, it has achieved the levels of cardholder and merchant acceptance that it needs to have a robust business. Amex told the Government that to achieve relevance it needed at least 93% merchant coverage. C.A. ER E-356-E-357. Amex's merchant coverage currently exceeds 95%. C.A. ER T-2279. Testimony at trial indicated that, at Amex's current volume level, any scale economies to be gained by increased volume would be "marginal." C.A. ER T-2334-T-2335.

[12] Discover increased its cardholder and merchant acceptance bases in double-digit percentages from year to year during the 1990s. See p. 6, *supra*. It marketed its cards "directly to consumer[s]," and did so aggressively – both by mail and on the internet. C.A. ER T-2586-T-2587. And Discover "launched * * * platinum and other affinity programs" and has "cross selling opportunities" through its parent Morgan Stanley Dean Witter. *Id.* at 2587.

The Second Circuit acknowledged its prior holdings that exclusive dealing arrangements do not harm competition if competitors can use alternative distribution channels to reach consumers, but distinguished those cases because they involved single-firm conduct rather than restraints adopted by a joint venture. App., *infra*, 20a-21a. Thus, even though MasterCard's policy did not foreclose access to consumers and, if adopted by a single firm, would have been permissible because it had no anticompetitive effect, the Second Circuit condemned the policy as an "exemplar[] of the type of anticompetitive behavior prohibited by the Sherman Act" because it was adopted by a joint venture of competitors. *Id.* at 21a. By treating the absence of meaningful foreclosure as irrelevant, the Second Circuit's ruling amounts to a *per se* condemnation of ancillary restraints imposed by joint ventures. See note 5, *supra*.

The district court explained that "it is undisputed that *either* Capital One or American Express could reach every consumer with an offer of *some* brand of credit card * * *, yet, it is only the combination of Capital One and American Express that provides consumers the ability to take advantage of the combined skills of both entities." App., *infra*, 147a (emphasis in original). The suggestion that the CPP limited product variety proves too little, and too much. It proves too little because the district court failed to consider whether the "combined skills" of member banks and Amex could produce a product that was meaningfully superior to a significant number of customers, rather than a marginal differentiation that would appeal to a few customers. It proves too much because the district court failed to consider that the CPP enhances the incentives of member banks and Amex each to develop their own unique features and capabilities. If a GM/Toyota joint venture develops a slightly better engine, and Ford develops a slightly better car body design, "product variety" is limited in the short term if consumers cannot buy a Ford body with a GM/Toyota joint venture engine, or a Ford body with a GM or Toyota engine created with the know-how the joint venturers acquired while working with each other. But the antitrust laws do not compel companies to share their respective advantages with competitors, because such forced sharing would undermine the incentives of each to improve its own products. See *Trinko*, 124 S. Ct. at 879. And "product variety" alone is no reason to make the joint venture share with a rival the competitive advantages and know-how that its members gained working together. It is *even less* reason to allow disloyal members to share that know-how with a rival.

The second category of "anticompetitive" effects consisted of alleged harm to petitioner's member banks as "consumers" of network services provided by petitioner. The district court found that Visa and petitioner "pay millions of dollars in incentive payments in the form of discounts from the price for network services to selected issuing banks to compete for their business and the banks play Visa and MasterCard against one another to obtain lower net prices and higher value for card network services." App., *infra*, 123a. Pointing to that finding, the Second Circuit concluded that "price competition and innovation in services would be enhanced if four competitors, rather than only two, were able to compete in this manner for issuing banks." *Id.* at 17a.

Both the district court and the court of appeals failed to consider the paradox inherent in this analysis: petitioner's member banks are both the victims and the beneficiaries (as members of the joint venture that sells network services at the higher price) of this restraint. Why would they choose to inflict these "anticompetitive effects" on themselves?

The answer, of course, is that these intra-venture effects are not "anticompetitive effects" that have antitrust significance unless they cause harm *to third parties who purchase from the joint venture or its members*. When competitors form a joint venture that will provide services to its members, the venturers *must* agree to allocate among themselves the costs of providing those services. Often, that means they will agree on a price (or at least a mechanism for determining a price) that the venture will charge to its members for those services. The venturers' agreement to set this price (or to allocate through some other mechanism the costs of providing the services) is not a *per se* violation of the antitrust laws. See *BMI*, 441 U.S. at 24-25.

The district court simply failed to ask the relevant question with regard to both categories of "anticompetitive effects." After finding harm to individual *competitors* – Amex and Discover with respect to the first category, and some of MasterCard's member banks with respect to the second – the district court failed to consider whether that harm would lead to harm to cardholders and merchants, the *consumers* the antitrust laws were meant to protect. Only by establishing some sort of significant foreclosure of competitors' access to consumers could the court have reached a sustainable finding of consumer harm. Otherwise, every effort by a joint venture to develop a *distinct* advantage – efforts that the antitrust laws should encourage – will generate phantom competitive "harm" if the joint venture fails to share that advantage with its rivals. If the district court's analysis is deemed sufficient to establish a violation of the antitrust laws, then virtually every loyalty requirement imposed by a joint venture is at risk.

C. MasterCard's procompetitive justification for the CPP was rejected for similar reasons. The district court found that MasterCard adopted the CPP because of "concern that some banks, selectively courted, might reach agreement with American Express and Discover, and that those banks would gain a 'competitive advantage' over other member banks." App., *infra*, 155a. MasterCard recognized that, if some of its member banks could issue Amex cards, the result would be "a loss of volume and share to American Express." MasterCard wanted "to avoid loss of market share." *Id.* at 156a.

The district court concluded that such motives were inconsistent with a procompetitive justification for the restraint. Plainly, they are not. Every joint venture loyalty provision – including the loyalty requirement adopted by a three-lawyer partnership – is similarly motivated. "To get ahead in the marketplace is not itself the kind of intention that contaminates conduct." Areeda, *supra*, at 853. That is true even if conduct is motivated by a desire to obtain a monopoly, let alone a desire to preserve a 26% market share. See *Trinko*, 124 S. Ct. at 879 ("The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.").

The district court also engaged in seriously flawed reasoning when it rejected MasterCard's justification because MasterCard permitted its members to issue Visa cards (and to issue Amex cards outside of the United States, where different competitive conditions exist). If it is procompetitive to allow banks to issue cards for two of the four major card networks, the court's reasoning runs, it must be even better to allow them to issue cards for all four major networks. But the conclusion does not follow. Duality – allowing each bank to issue both MasterCard cards and Visa cards rather than restricting each bank to one brand or the other – is procompetitive *on balance* even though "historically 'duality' has led to some blunting of competitive incentives" (App., *infra*, 90a). The tradeoff (see p. 5, *supra*) between enhanced bank-to-bank competition and lessened system-to-system competition is not the same when *all* systems have access to all banks (maximizing the diminution of intersystem competition) as when only two of the four major networks have access to the banks and the other two networks must compete – as they have done very successfully – using a different business model. In particular, if Amex and Discover are allowed the same access to member banks that MasterCard and Visa have, but are not required to be open systems as MasterCard and Visa are, those banks with the most to contribute to the MasterCard and Visa joint ventures will be the ones Amex and Discover selectively target, weakening MasterCard and Visa as competitive forces while strengthening Amex and Discover. It is difficult to understand how anyone could predict with confidence that such a situation would be better for consumers than the current situation, in which two strong open joint ventures compete against two strong vertically integrated issuers. Cf. *Premier Elec. Constr. Co.* v. *Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 370 (7th Cir. 1987)

(Easterbrook, J.) ("since *BMI* courts have been appropriately modest about their ability to discern the optimal amount of cooperation in an industry"). The courts below reached the wrong conclusion because they never asked – as other circuits do – whether the restraint "harms consumers, the focus of the alleged violation." *MountainWest*, 36 F.3d at 971-972.

D. The record in this case contains ample evidence that consumers were *not* harmed by MasterCard's CPP. The Second Circuit brushed aside what the antitrust laws are supposed to be all about, in favor of formalism. The Second Circuit's description of the CPP as a horizontal restraint – which led it to analyze this case in terms far more typical of *per se* analysis than full rule-of-reason inquiry – is wrong. See Piraino, *supra*, at 931 ("Agreements by partners not to compete with their own joint venture, however, are vertical and only limit competition within the venture's sphere of activities."). The concededly procompetitive MasterCard and Visa *joint ventures* bring together horizontal competitors (banks), but the relevant *restraint* is vertical and should have been judged – as vertical restraints typically are – by asking to what degree it foreclosed rivals from access to consumers. See, *e.g.*, *U.S. Healthcare, Inc.* v. *Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993) (Boudin, J.). In any event, whether the restraint is horizontal or vertical, the real question under the rule of reason – which the Second Circuit recognized it should apply, though it was applied in name only – is whether consumers were harmed. Here, they were not.

The Second Circuit's decision, unless this Court intervenes, will undermine the incentives for vigorous competition that have produced compelling consumer benefits in an industry of fundamental importance to the economy. Even worse, the Second Circuit has affirmed a judgment of antitrust liability based largely on the inherent characteristics and effects of loyalty requirements, an approach that threatens almost any competition-enhancing ancillary restraint adopted by a joint venture.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOAH J. HANFT
EILEEN S. SIMON
JAMES P. MASTERSON
MasterCard International Incorporated
2000 Purchase Street
Purchase, New York 10577
(914) 249-2000

KEVIN J. ARQUIT
AIMEE H. GOLDSTEIN
Simpson, Thacher & Bartlett LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

KENNETH A. GALLO
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1615 L Street, NW
Suite 1300
Washington, D.C. 20036
(202) 223-7300

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
MAX HUFFMAN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

JAMES C. EGAN, JR.
Weil, Gotshal & Manges LLP
1501 K Street, N.W.
Suite 100
Washington, D.C. 20005
(202) 682-7000

* *Counsel of Record*

MAY 2004